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Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

LINDA R. SHARP,
Petitioner

v.

DAVID C. MILLER, ROBERT F. WARWICK,
STEPHEN LOCKE,
LOWRIMORE, WARWICK & CO. and
McGLADREY & PULLEN,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE
NORTH CAROLINA COURT OF APPEALS

Linda R. Sharp, pro se
Petitioner
3003 N. Croatan Highway
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86 pp

QUESTIONS PRESENTED

I. Whether an accountant providing litigation support in a civil case as an "expert witness" that (a) failed to follow generally accepted appraisal theory and accounting methodology and, (b) engaged in fraudulent and deceptive conduct is entitled to an absolute immunity from suit by client, and does said absolute immunity constitute a denial of the Due Process Clause of the Fourteenth Amendment?

2. Whether excessive and severe Rule 11 sanctions were applicable against pro se Petitioner as damages for filing suit in violation of the Eighth Amendment on the imposition of excessive fines and constitute a denial of the Due Process Clause of the Fifth Amendment?

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PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

To the Honorable William H. Rehnquist, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Linda R. Sharp, pro se the petitioner herein, prays that a writ of certiorari issue to review the judgement of the North Carolina Court of Appeals entered in the above.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported at COA95-167 and is printed in Appendix A, page 2. The order of the Supreme Court of North Carolina is printed in Appendix A, Page 11.

JURISDICTION

The judgement of the North Carolina Court of Appeals (Appendix A, page 2) was entered on February 20, 1996. A timely petition for discretionary review was filed on March 22, 1996 with the Supreme Court of North Carolina, which was denied on May 9, 1996, (Appendix A, page 11).

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitutional Amendment XIV. Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitutional Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitutional Amendment V, Section 4.

That neither life, liberty nor property may be taken without due process of law.

STATEMENT OF CASE

Petitioner filed a complaint against respondent accountants on July 21, 1994 alleging negligence (failure to act in good faith), detrimental reliance (false representation or fraud and unfair and deceptive trade practices), breach of contract (as in "bait and switch") and breach of fiduciary duty (constructive fraud) while they performed litigation support services for Petitioner as appraisers and valuation expert witnesses in Petitioner's equitable distribution case with her former husband. In the trial court hearing, the respondents argued that

"as witnesses in a judicial proceeding, the defendants have absolute immunity from subsequent suit for damage liability" and cited the U.S. Supreme Court case of Briscoe v. LaHue, 460 U.S. 325, 342-43, 75 L. Ed. 2d 96, 113-14 (1983) as the basis for that immunity. The trial judge agreed and dismissed the claim based on the Respondents immunity from suit and awarded sanctions against petitioner in the amount of $7,450.79 for legal fees incurred by Respondents in filing their motion to dismiss on the basis of immunity. The NC Court of Appeals entered their order affirming the trial courts decision again finding that respondents were absolutely privileged and immune and cannot be made the basis of any cause of action alleged by Petitioner. The NC Court of Appeals again cited Briscoe v. LaHue as the basis

for their decision on the absolute immunity of accountants performing litigation services of appraisals and business valuations. The NC Court of Appeals affirmed the judgement of the trial court's imposition of sanctions against Petitioner who appeared pro se. The NC Court of Appeals did not address Petitioner's other assignments of error.

Reasons for Granting Writ

This petition for writ of certiorari involves important legal issues arising from the emergence of a relatively new category of professionals who perform "litigation support services." For example, in the last ten to fifteen years, litigation services has become an important practice area for many CPA firms. During that time, CPAs serving as consultants and expert witnesses believed

that they were immune from suit under the so-called litigation privilege. Although some states continue to recognize an immunity for those serving as expert witnesses, several states, including California (which has a privilege statute), have held that CPAs performing litigation support services are not immune from suit, even from a client. In the case at bar, the North Carolina Court of Appeals found that the Respondents were immune from suit based upon the federal civil rights case of Briscoe v. LaHue even though the North Carolina General Statues and Constitution grant no immunity to any individuals serving as consultants and expert witnesses in a civil case. Briscoe is an action giving absolute immunity for police officers sued under Section 1983 for their testimony as witnesses. It does

not even make an attempt at giving absolute immunity to litigation support providers such as Respondents. This area of the law is badly in need of the Supreme Court's authoritative voice. The Supreme Court needs to be making law in this area, since the individual states are arriving at different opinions in this important area, without consideration of federal statutes and the Constitution of the United States. See Appendix B for recent articles in the American Institute of Certified Public Accountants' publications on concerns of the profession on expert witness liability while serving as litigation support providers.

In this case, Respondents were sued by a "litigation support" client (Petitioner) after her equitable distribution case was heard in which the

Respondents were appointed to perform appraisals and business valuations, signed a contract with Petitioner, and operated under a consent order as expert witnesses. This case differs from Briscoe v. LaHue because Briscoe is a criminal case involving perjured statements from police officers.

The North Carolina Court of Appeals erred in holding that immunity shields defendants from liability stemming from its conduct.

Neither public policy, case law or statutory law support the complete immunity of professionals performing litigation support work from any and all liability or oversight.

To allow Respondents to assert that broad a privilege as immunity is tantamount to creating a new class of

professional -- "litigation support" accountants--who enjoy an absolute immunity status equal to diplomatic immunity.

In California (which has a litigation privilege statute that grants immunity), in a case featured in the December, 1994 issue of the Journal of Accountancy (Appendix B), in the article titled Expert Witnesses--In Jeopardy? the court held in Mattco Forge, Inc., et al., v. Arthur Young & Co. et al., 5 Cal. App. 4th 392;_ Cal Rptr. 2d [Apr. 1992] "that the litigation privilege does not shield a party's own witness from ar action by the party arising from the expert's negligence and breach of contract." Simply put, the privilege of immunity does not exist to protect a party's own expert witnesses from liability to the party. While the

privilege of immunity may shield litigants, attorneys, and witnesses giving testimony from liability for virtually all torts except malicious prosection, it does not protect an attorney from liability to a former client for legal malpractice.

Common law immunity of parties and witnesses from subsequent damage liability applies to testimony, not to litigation support work, which was Respondents' principal obligation under their contract and consent order with Plaintiff

No category of professionals should be completely immune from liability. The North Carolina Court of Appeals took a drastic step and immunized accountants who perform litigation support work from all liability associated with that work because they could ultimately serve as "witnesses" in judicial proceedings.

Simply stated, the rule adopted by the North Carolina Court of Appeals is contrary to public policy. If the Respondents hadn't testified, which wasn't covered in the contract/consent order, would they still be immune from suit?

Lawyers participate in judicial proceedings. However, they are commonly sued when they bungle their jobs. Should lawyers be immunized from all suits? If not, why should accountants performing litigation support work be treated differently?

Plaintiff's complaint cites numerous causes of action charging Respondents with fraud and negligent misrepresentation arising out of Respondents' solicitation of its litigation support engagement in particular in its "bait and switch" of offering one specialist and substituting a

inexperienced accountant. Accordingly, the rest of the complaint in showing causes of action, fall outside of the scope of the privilege of immunity due to the fraud, unfair and deceptive trade acts and negligent misrepresentation arising out of Respondents' solicitation of its litigation support engagement.

Moreover, Plaintiff's first cause of action for negligence sets forth numerous separate and distinct acts which constitute malpractice. The Complaint states failure to follow specific Professional Ethics and Conduct Rules of the North Carolina Accountancy Rules and violations of the Uniform Standards of Professional Appraisal Practice promulgated by the Appraisal Standards Board of the Appraisal Foundation and Statements and Standards of the American

Institute of Certified Public Accountants.

English Common Law cannot be interpreted to completely immunize Respondents from this suit in which they performed work as litigation support specialists.

There is no North Carolina nor federal authority for the proposition that a party to a judicial proceeding is absolutely barred from pursuing an action against his own expert witness.

The decision of the North Carolina Court of Appeals deprives Plaintiff of her rights to procedural due process under the Fourteenth Amendment of the Constitution of the United States. The propriety of taking judicial notice implicates a plaintiff' opportunity to be heard, an element of due process. Parker v. Twentieth Century-Fox Film Corp., 3 Cal.3d

176, 189 (1970). Due process is violated where a party is denied the right to have his cause tried and determined in accordance with procedures that are applied in other cases of like character. **This case has significant public interest.**

The North Carolina Court of Appeals erred in holding that as a matter of law immunity shields defendants in civil court from liability stemming from its conduct. The NC Court of Appeals ruling that the present action is barred by law makes accounting firms absolutely immune from any and all liability arising out of their solicitation and performance of "litigation support" work. The trial court's ruling is contrary to public policy.

The North Carolina Court of Appeals ruling creates a blanket immunity for any

professional rendering "litigation support" services based solely upon the premise that members of this category of professionals ultimately serve as witnesses in judicial proceedings. The trial court's ruling imposes no accountability on this category of professionals and leaves them free to engage in false advertising of their "litigation support" capabilities, to assign incompetent and inexperienced and untrained personnel to work on such matters, and to commit malpractice with impunity.

This result is not only contrary to the public policy which seeks to ensure the integrity of the judicial system, but is also inconsistent with the fundamental premise of the Due Process Clause of the Fourteenth Amendment.

Immunizing an entire category of professionals from suit would send a dangerous signal to the litigation support community that it can freely engage in damage fraud with impunity.

This case involves a legal principle of major significance to the jurisprudence of the United States.

The North Carolina Court of Appeals decision constituted error because Respondents' conduct at issue in this case cannot be adequately characterized as a "statement" or "publication." Petitioner's complaint alleges committed tortious acts. That conduct is not shielded by common law witness immunity.

In a recent case the North Carolina Supreme Court has stated that if the legislature hasn't passed a law, the Court cannot make it a law. This was

demonstrated In the Matter of: The Appeal of Phillip Morris U.S.A. v. Catawba County, 436 S.E. 2d 828, 335 N.C. 227, the general rule in North Carolina is that absent 'constitutional restraint, questions as to public policy are for legislative determination.' Therefore, we must consider whether the legislature has determined the public policy with regard to the issue before us.

The NC Court of Appeals in the case at bar expanded its authority to go "beyond" the Constitution of the United States and North Carolina and the General Statutes of the State of North Carolina and "extended" immunity to court appointed persons acting as litigation support providers. By the act of "extending" the court created a new immunity, a new exemption from accountability, which has

not existed in the laws of the United States. The court in the State of North Carolina does not have jurisdiction to legislate and has no right either to create a new cause of action or to abolish those which are already established. Those are legislative functions.

In the matter of the second question, the affirmation of the granting of sanctions by the North Carolina Court of Appeals is in conflict with Payne v. Duracell U.S.A. 745 F. Supp. 341 (M.D.N.C. 1990) which held: The Court agrees that Plaintiff violated the rule by filing his demotion claim. The Court does not consider an award of costs and attorney's fees to be appropriate, however. Only a cursory review of the law was required for Duracell to discern its defense to this claim, and it preparation to establish the

facts had to be undertaken in any event to defend against Plaintiff's other claims. The Court, therefore, determines an award of $50.00 to be appropriate.

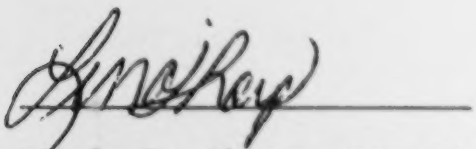
The NC Court of Appeals affirmed the trial court's excessive and severe sanctioning of Petitioner for Respondents' attorney fees in the amount of $7,450.79 which violated her rights under the Eighth Amendment and Due Process Clause of the Fifth Amendment of the Constitution of the United States. Petitioner, in preparing her complaint, reasonably relied on the verdict in the Mattco Forge, Inc., et al., v. Arthur Young & Co., et al, which allowed clients to file suit against the expert witnesses with whom they had contracted for litigation support services, and denied immunity. If it was true, and only a cursory review of the law

was required in this case in order to discern its defense to the claim, Respondents should only be entitled to $50.00 in legal fees, as in Payne v. Duracell.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully Submitted,



Linda R. Sharp, pro se
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3003 N. Croatan Hwy
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(919) 441--2833

Dated: August 5, 1996.

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STEPHEN LOCKE,
LOWRIMORE, WARWICK & CO. and
McGLADREY & PULLEN,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE
NORTH CAROLINA COURT OF APPEALS

APPENDIX A

No. C0A95-167

NORTH CAROLINA COURT OF APPEALS

Dare County No. 94-CVS-387

Filed: 20 February 1996

LINDA R. SHARP,
Plaintiff

v.

DAVID C. MILLER, ROBERT P. WARWICK, STEPHEN LOCKE, LOWRIMORE, WARWICK & CO. and McGLADREY & PULLEN,
Defendants

Appeal by plaintiff from order entered 4 October 1994 by Judge J.Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 13 November 1995.

Plaintiff, Linda R. Sharp, was formerly married to Starkey Sharp, an attorney in Dare County, North Carolina. This action arises incident to defendants' involvement as expert witnesses and litigation support in the equitable

distribution case between Linda Sharp and Starkey Sharp. Sharp v. Sharp, 116 N.C. App. 513, 449 S.E.2d 39, disc. review denied, 338 N.C. 669, 458 S.E.2d 181 (1994) . Defendants were appointed by a referee on 11 December 1990, with the parties' consent, to appraise certain property and testify as expert witnesses as to the values determined.

Plaintiff's complaint filed 21 July 1994 alleged that defendants improperly performed their duties as appraisers and expert witnesses. Specifically, plaintiff alleged negligence, detrimental reliance stemming from false representations or fraud, breach of contract and breach of fiduciary duty. In response, defendants' filed a motion to dismiss and for sanctions and attorney's fees. After hearing en 3 October 1994, Judge J.

Richard Parker rendered his decision in open court to grant defendants' motion to dismiss and to impose sanctions.

Plaintiff appeals.

Linda P. Sharp, plaintiff-appellant, pro se.

Hornthal, Riley, Ellis & Maland, L.L.P., by L.P. Hornthal, Jr., and Phillip K. Woods, for defendant-appellees.

EAGLES, Judge.

Plaintiff assigns error to the trial court's grant of defendants' motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b) (6). Our standard of review is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory . . . . " Harris v. NCNB, 85 N.C. App. 669, 670, 355 S.E.2d

838, 840 (1987). "In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint 'unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief.'" Sinning v. Clark, 119 N.C. App. 515, 517, 459 S.E.2d 71, 73 (quoting Dixon v. Stuart, 85 N.C. App. 330, 340, 354 S.E.2d 757, 750 (1987)), disc. review denied, 342 N.C. 194, 463 S.E.2d 242 (1995).

After careful review of plaintiff's complaint, we conclude that plaintiff's allegations fail to state a claim upon which relief may be granted. Defendants conducted their appraisals and other evaluations in preparation for providing expert witness testimony in the "due course of a judicial proceeding." Williams

v. Congden, 43 P.C. App. 53, 53, 297 S.E.2d 677, 678 (1979). The appraisals and reports made by defendants here are absolutely privileged and cannot be made the basis of any cause of action alleged by plaintiff. Id.; Bailey v. McGill, 247 N.C. 286, 293-94, 100 S.E.2d 860, 866-67 (1957); Godette v. Gaskill, 151 N.C. 51, 52, 65 8.E. 612, 612-13 (1909). Accordingly, we conclude that plaintiff's complaint was properly dismissed.

Plaintiff also assigns error to the trial court's imposition of Rule 11 sanctions against plaintiff. "According to Rule 11, the signer certifies that three distinct things are true: the pleading is (1) well grounded in fact; (2) warranted by existing law, 'or a good faith argument for the extension,

modification, or reversal of existing law' (legal sufficiency) ; and (3) not interposed for any improper purpose." Bryson v. Sullivan, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992). "A breach of the certification as to anyone of these three prongs . . ." requires the imposition of sanctions. Id. "The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. Section 1A-1, Rule 11(a) is reviewable de novo as a legal issue." Turner v. Duke University, 325 P.C. 152, 165, 381 S.E.2d~706, 714 (1989).

Plaintiff argues that the trial court erred in determining that plaintiff's complaint was not well grounded in fact and was not legally plausible on its face. We are not persuaded. Plaintiff's complaint states that "[d]efendants'

actions as expert witness [[sic] in connection with the equitable distribution case of Starkey and Linda R. Sharp are the subject of this action." The remainder of plaintiff's complaint primarily alleges numerous irregularities in the expert testimony and in defendants' report that was the basis of the expert testimony and that was prepared solely for the purpose of providing expert testimony.

As we have recognized, defendants are absolutely immune from suit for their actions in preparing the report to guide expert testimony as well as in providing expert testimony in the course of a judicial proceeding. Williams, 43 P.C. App. at 55, 257 S.E.2d at 678. This immunity from civil suit extends so far as to protect one who allegedly commits

perjury. Briscoe v. LaHue, 460 U.S. 325, 342-43, 75 L. Ed. 2d 96, 113-14 (1983); see Bailey, 247 N.C. at 293-94,100 S.E.2d at 866-67. Plaintiff's brief in opposition to defendants' motion to dismiss ignores this well-established precedent regarding witness immunity and fails to argue for a reversal or modification of this existing and well-established law. Accordingly, we conclude that the trial court properly imposed Rule 11 sanctions against plaintiff.

Plaintiff next argues that the trial court erred in ordering plaintiff to pay defendants' costs of defending this action including reasonable attorney's fees as a sanction. We disagree. In reviewing the propriety of the sanction imposed, the standard is one of abuse of discretion. Turner, 325 N.C. at 165, 381 S.E.2d at

714. On this record, we conclude that the sanction imposed was within the trial court's discretion. We need not address plaintiff's remaining assignments of error.

Affirmed.

Chief Judge ARNOLD and MARTIN, John C., concur.

No. 124P96 FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

LINDA R. SHARP

V

DAVID C. MILLER, ROBERT F. WARWICK, STEPHEN LOCKE, LOWRIMORE, WARWICK & CO. and McGLADREY & PULLEN

From NC Court of Appeals

(COA95-167)

From Dare (94CVS387)

****

ORDER

Upon consideration of the petition filed by Plaintiff (Pro Se) in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S.7A-31, the following order was entered and is hereby certified to the

North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 9th day of May 1996.

s/ Orr, J.

For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of May 1996.

Christie Speir Cameron

Clerk, Supreme Court of North Carolina

Copy to:
North Carolina Court of Appeals
Ms. Linda R. Sharp, Pro Se
Mr. L.P. Hornthal, Jr., Attorney at Law, For Miller et al
Mr. Phillip K. Woods, Attorney at Law, For Miller et al
Mr. Ralph A. White, Appellate Court Reporter
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APPENDIX B

EXPERT WITNESSES--IN JEOPARDY?[1]

Experts aren't always protected from lawsuits, so it pays to be informed.

Litigation services have become one of the faster growing practice areas for CPAs. Many practitioners previously dedicated to accounting and auditing have entered this area part-time or full-time. More CPAs are preparing damage analyses, performing business valuations, assisting counsel in document productions, participating in negotiations and providing expert witness testimony. Unfortunately, litigation against expert witnesses is increasing as well.

Professional liability has become a

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[1]Journal of Accountancy, December 1994, written by Michael A. Crain, Dan L. Goldwasser and Everett P. Harry

key concern for all CPAs, but most of the problems have been in traditional services. Because there have been relatively few cases against expert witnesses, some practitioners erroneously believe this practice area carries little or no liability exposure. A California lower court case demonstrates why this is a dangerous assumption: A jury awarded $14.2 million in compensatory damages and approximately $28 million in punitive damages in the first major plaintiff victory against a CPA firm performing litigation services (see Mattcho Forge section) Practitioners who serve as expert witnesses clearly need to take the threat of litigation seriously.

EMERGING THREATS

Two factors have led to an increase in claims against all types of expert

witnesses, both by the expert's client and opposing parties:

* In litigation, at least one party is likely to be unhappy with the outcome and will search for someone to blame.

* The courts are beginning to erode the barriers that have protected expert witnesses from liability claims.

Potential allegations against CPA-experts include:

* Breach of contract: The CPA failed to perform some aspect of the engagement.

* Professional malpractice: The expert's testimony about a business valuation was wrong; an exhibit used for trial was flawed; during pretrial negotiations, the expert did not properly disclose his or her opinion and misled the opposing party, resulting in a poor settlement for that party; the expert

released improper documents to the opposing side during the discovery process.

* Libel or slander: The CPA made damaging remarks about another person or entity.

* Disparagement: The accountant damaged the reputation of the opposing party's business.

* Fraudulent or negligent misrepresentation: The opposing party incurred damages because the CPA misstated facts during the trial.

* Disclosing a client's confidential information: The CPA-expert used another client's information (without permission) for industry data comparisons.

KNOW THE STANDARDS

To minimize exposure to professional liability, the CPA first should determine

which professional standards apply to the engagement. The standards always applicable to litigation services are composed of the American Institute of CPAs Code of Professional Conduct and Statement on Standards for Consulting Standards (SSCS) no. 1, Consulting Services: Definitions and Standards. Nonauthoritative educational guidance is available in AICPA Consulting Services Special Report 93-1, Application of AICPA Professional Standards in the Performance of Litigation Services, and Consulting Services Special Report 93-2, Conflict of Interest in Litigation Services Engagement. Other professional standards also could apply if certain types of services, such as an audit, are performed as part of the litigation engagement.

The courts won't necessarily perceive

the CPAs responsibilities as limited to the code and SSCS no. 1. In determining compliance with professional responsibilities, the courts frequently consider practice aids and other nonauthoritative guidance. Accordingly, CPAs serving as expert witnesses should stay abreast of the applicable professional literature. As a practical matter, they also should be aware of publications that are considered "authoritative," even though CPAs' professional standards don't recognize them as such, and be prepared to explain any departure from them.

Important professional ethics issues in expert witness services include

Integrity and objectivity. Rule 102 of the AICPA Code of Professional Conduct says, "In the performance of any

professional service, a member shall maintain objectivity and integrity, shall be free from conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgement to others."

As an expert witness, the CPA must understand that the attorney alone is the client's legal advocate. When the CPA consults with a lawyer under the attorney work-product privilege and is not a witness, the CPA may assist in developing a partisan case but should tell the lawyer of any significant reservations he or she has.

The CPA may not knowingly provide misleading information to any party during any phase of the engagement, but he or she isn't required to volunteer information. For example, in settlement talks, the CPA

expert witness should not attempt to negotiate a favorable client settlement by providing a knowingly inaccurate damage assessment or business valuation. Likewise, he or she should not make preliminary statements to any party about damage or valuation amounts without sufficient data unless the limitations of those preliminary conclusions are disclosed.

Professional competence. Rule 201 of the AICPA Code of Professional Conduct says, "A member shall ...undertake only those professional services that the member or the member's firm can reasonably expect to be completed with professional competence."

While a CPA clearly must be competent in a technical area, such as business valuations, it is not as clear whether the

practitioner must be competent in the law. Clients often engage a particular CPA or firm because of past litigation services experience. Does the CPA have a responsibility to know about legal matters, such as the new mandatory reporting requirements for experts described in rule 26(a)(2) of the amended Federal Rules of Civil Procedure? who is responsible if a mandatory reporting disclosure is omitted and the expert's report is rejected? Who is responsible if the expert's report is not submitted 90 days before trial, as now required? At least one court apparently has held a CPA firm responsible for knowing evidentiary rules because the firm had held itself out as being expert in litigation matters (see following section). To minimize misunderstandings, the CPA should not

profess legal expertise and should reach an understanding that counsel will advise the CPA of any legal requirements (for example, legal deadlines that pertain to the CPA)> The understanding should be expressed in the engagement letter or in a separate communication to the attorney.

Additional elements of rule 201 important in litigation services are

Due professional care. The CPA should support each conclusion by performing the necessary procedures. However, when, for example, the practitioner is prevented from performing critical procedures due to a lack of information, the CPA should inform the client. The trier of fact also should be informed st it is not misled about how the particular conclusion was reached.

Supervision. The CPA actually giving

the testimony should personally provide direct or indirect staff supervision. Litigation engagements typically don't allow firms to leverage staff, as is done in accounting and auditing work.

Sufficient relevant data. CPAs must obtain or attempt to obtain sufficient relevant information to provide a reasonable basis for expert witness opinions and other conclusions.

LIMITING EXPERT LIABILITY CLAIMS

One of the CPA' best defenses against litigation is good communications with the client, particularly a well-prepared engagement letter. There have been occasions when a CPA was accused of not fulfilling the engagement requirements. This can happen when the CPA promises more in the engagement agreement than ultimately is performed or even warranted.

Because circumstances may change during the litigation-expected information does not become available or there is a change in the attorney's strategy - the CPA should not promise that a specific task will be performed or that a conclusion will be reached when developing the engagement letter. This prevents the client from claiming a breach of contract if the CPA can't reach the conclusion the client seeks and also prevents a loss of credibility based on preconceived conclusions.

Like engagement letters for other services, those for expert witnesses should specify what tasks the client or others must perform to enable the CPA to carry out the assignment. This, too, is an important protection against breach-of-contract claims. For example, if the CPA

is retained to compute the costs the plaintiff has incurred because of the defendant's wrongful actions, the CPA may not be able to complete the engagement without the plaintiffs financial data.

A litigation services engagement is a consulting service classified as a transaction service under SSCS no. 1, which requires the CPA and client to reach an understanding about the services or procedures to be provided. the initial oral or written understanding often is reached at the beginning of the litigation assignment but may change during the engagement as new facts arise or circumstances change. accordingly, the CPA should advise the client of any significant changes during the engagement. Any engagement letter should set forth the general tasks the CPA has agreed to

perform and no others. If the engagement is open-ended at the outset, the engagement letter should list any known needed services as well as a catch-all phrase providing for "such other services as you (or your attorney) may specifically request us to perform." This places the burden on the retaining party and the party's counsel to prove that any services were specifically requested and not performed.

Some expert witnesses (usually non-CPAs) have gotten into trouble by misrepresenting or exaggerating their academic backgrounds or work experience. Such misrepresentations have led to claims by opposing parties who declined to challenge an expert's testimony because of his or her purported credentials, and by clients whose cases deteriorated when the

expert's credibility was destroyed after his or her misrepresentations were revealed.

When a practitioner is asked to give an opinion on, for example, the costs to accomplish a certain task, the damages incurred as a result of past events or the value of a business enterprise, there are potential liability risks if the CPA alone determines the methodology and criteria by which the opinion will be reached. Often, there are no specific authoritative standards to guide the CPA's detail work. It may be helpful to discuss methodology and criteria with the attorney and perhaps to state in writing which ones the CPA will use in making the determinations mutually agreed on by the CPA and the attorney. In this way, oversights in reaching the expert opinion can be

avoided. The practitioner, however, must be comfortable with his or her basis for reaching any conclusions. All too often, experts are pressured into positions by counsel, only to recant their opinions under cross-examination.

As noted above, CPAs normally should not guarantee to provide a specific opinion or testimony. It may be appropriate to say in the engagement letter that the CPA provides an opinion only after an analysis of the available relevant facts. Of course, the CPA may provide preliminary thoughts to the client, but early statements may change based on the actual facts revealed during the engagement. The CPA normally should advise the client if it appears that he or she will not be able to render an opinion or will not be able to render one that

supports the client's position. This is an important safeguard against a later breach-of-contract claim alleging the CPA failed to perform the engagement.

Frequently, a CPA will be retained by an attorney but paid by his or her client. This is perfectly permissible, but the CPA should consider getting the party's written acceptance of the engagement letter's payment terms. Additionally, the CPA should ensure the attorney's client can pay the fees. If the expert has not been paid when he or she testifies, the opposing attorney could suggest the CPA's opinion is improperly influenced by the outstanding fees and is not independent.

CPAs also may consider including limitations on liability clauses in their engagement letters. Under such provisions, the CPA firm's liability is

limited to engagement fees, some multiple of them or a specified amount. Many clients (especially attorneys) balk at this provision; however, if the CPA has appropriate bargaining power, the clause can be obtained.

While there is no prohibition against asking a client to indemnify the CPA against lawsuits, these arrangements do pose risks because they could be perceived as affecting the CPA's expert opinion. It's quite possible the attorney seeking the CPA's services might find such a provision unacceptable for this reason. Nevertheless, such provisions could help reduce a CPA's exposure to baseless lawsuits.

Like other engagements, litigation services are governed by client confidentiality provisions. Litigation

services engagements are particularly sensitive since the CPA may be working under counsel's work-product or attorney-client privilege, and an inadvertent disclosure might jeopardize that privilege and adversely affect the outcome. Additionally, some jurisdictions recognize an accountant-client privilege and protected communications or work should be kept confidential unless specifically released by the client. In these jurisdictions, a CPA not serving as an expert witness normally is exempt from a subpoena. In this situation, the CPA's attorney can file a protective order after being served with the subpoena to prevent the CPA's deposition or production of client files.

CPAs must impress on their staff members the high sensitivity of litigation

services engagements. Of course once a CPA takes the stand, he or she may be required to disclose any information he or she reviewed in formulating an opinion. the engagement letter should carry a warning to this effect.

SIGNS OF EROSION

Although all types of expert witnesses generally have enjoyed a litigation privilege making them virtually immune from civil liability, there now is pressure on the courts to erode that protection. The traditional expert witness privilege was based on three considerations:

1. Without such a privilege, there would be no end to litigation, with each aggrieved party suing one or more witnesses from the last lawsuit asserting wrongful, damning testimony.

2. Witnesses might be unwilling to testify, fearing they would become the subject of future litigation.

3. The cross-examination process is sufficient to protect a litigant against untrustworthy witnesses.

The courts, however, are beginning to conclude that these considerations don't necessarily apply to the expert witness. Experts accept engagements as part of their professional services and are paid for their time, so they don't need special protection to encourage them to testify. In addition, they often testify on subjects beyond an attorney's knowledge, precluding effective cross-examination. Perhaps most important, there is considerable economic incentive for some "professional" experts (usually non-CPAs) to tailor their testimony to support a

client's positions, so a deterrent is needed to keep them honest. For these reasons, the current national trend is toward disallowing the litigation privilege for all types of expert witnesses.

A complete discussion of litigation privilege is beyond the scope of this article. Additionally, privilege varies by jurisdiction and may not apply if the expert does not testify. For the immediate future, however, the privilege remains the principal line of defense for CPAs and other testifying experts who are sued. Unfortunately, the future of this privilege is largely out of the accounting profession's hands. The courts entertain a wide variety of expert testimony, including medical testimony, forensic testimony from police officials and crime

laboratories, architectural and engineering testimony and testimony on a wide variety of business issues (such as industry practices and proprietary technical matters). If abuses continue in these areas, the resulting reforms will likely affect CPAs as well.

A CONCERN FOR ALL

Potential professional liability claims should be a concern for all litigation services practitioners. CPAs can and should attempt to minimize this exposure in addition to complying with the appropriate professional standards. Engagement letters should be prepared carefully to delineate the general scope of services to be provided, limit the CPA's liability exposure and warn the client of the limitations on the CPA's services. Moreover, any changes in the

engagement should be communicated to the client orally or in writing. By taking prudent steps, CPAs can help limit their exposure while providing a valuable, growing service to clients.

EXECUTIVE SUMMARY

* LITIGATION SERVICES are one of the fast-growing practice areas for CPAs. Because there have been relatively few cases against expert witnesses, some practitioners erroneously believe this practice area carries little or no liability exposure. But in a recent California case, a jury awarded $14.2 million in compensatory damages and approximately $28 million in punitive damages in the first major plaintiff victory against a CPA performing litigation services.

* TO MINIMIZE LIABILITY, CPAs first should

determine which professional standards apply to an engagement. In determining compliance with professional responsibilities, the courts frequently consider practice aids and other nonauthoritative guidance, so CPAs should stay abreast of applicable professional literature.

* ENGAGEMENT LETTERS should be carefully prepared to delineate the general scope of services to be provided, limit the CPA's liability exposure and warn the client of the limitations on the CPA's services. Any changes during the engagement should be communicated to the client and memorialized in writing. By taking prudent steps, practitioners can help limit their exposure.

MATTCO FORGE

A recent California lower court case was

the first major plaintiff victory against a CPA in the performance of litigation services. (The case is being appealed.)

In June 1994, a Los Angeles Superior Court jury awarded $14.2 million in compensatory damages and approximately $28 million in punitive damages to the plaintiff in Mattco Forge, Inc. v. Arthur Young & Co. The jury's verdict against the firm was for professional malpractice, fraudulent misrepresentation and fraudulent concealment. In addition, the jury awarded punitive damages of $250,000 against the Arthur Young partner and $5,000 against the Arthur Young manager. The trail followed a 1992 California Court of Appeals decision that Arthur Young did not have the litigation privilege to protect it from a lawsuit.

According to the 1992 opinion, the

CPA firm was retained to compute lost profits for its client, Mattco, in a lawsuit against General Electric. Arthur Young asked for information from Mattco about its GE contracts, but some original documents could not be located, so Mattco recreated missing contract estimating sheets, gave them to the CPA firm and reportedly told the firm the documents and workpapers used during the assignment, including Mattco's reconstructed estimating sheets. GE filed and won a motion that found the recreated documents were fraudulent. The court assessed sanctions against Mattco, which abandoned the GE lawsuit. Mattco then sued Arthur Young alleging malpractice, fraud, negligent misrepresentation, breach of contract and other wrongdoings. A Los Angeles Superior Court found that the

litigation privilege shielded Arthur Young from liability but a court of Appeals reversed the decision.

The following are some of the practical concerns in a litigation services engagement and Mattco Forge's allegations about the firm's work:

Planning and supervision: The CPA firm partner did not adequately review the workpapers.

Professional competence: The partner and manager were not sufficiently experienced in litigation services.

Communications: The manager didn't tell the partner or the client (the attorney) that the engagement files included noncontemporaneous documents.

Workpaper annotations: The manager didn't date the recreated estimating sheets or otherwise disclose the

recreation of data.

Misleading advertising: Firm brochures reportedly said its litigation services professionals were skilled in working with a real or apparent lack of data.

Quality Assurance reviews: There was no indication the engagement team sought help from more experienced litigation services professionals.

CPAs providing litigation consulting or expert witness services are well advised to review the Mattco case and ensure their practices do not generate unnecessary risks.

EXPERT WITNESS LIABILITY: PRACTICAL SUGGESTIONS FOR MINIMIZING THE RISK[2]

In the last ten to fifteen years, litigation services has become an important lucrative practice area for many CPA firms. During that time, CPAs serving as consultants and expert witnesses believed that they were immune from suit under the so-called litigation privilege. Although some states continue to recognize

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[2]CPA EXPERT, AICPA Newsletter for Providers of Business Valuation & Litigation Services, Premier Issue, Volume 1, Number 1, page 1. Published by the American Instittue of Certified Public Accountants, Copyright 1995, article written by John M. Moscarino, JD, a partner is the law firm of O'Neill, Lysaght & Sun, Santa Monica, California. He was trial counsel for the plaintiff in Mattco Forge v. Arthur Young, which is believed to be the first case in which a plaintiff has obtained a jury verdict against a CPA firm for misconduct in connection with a litigation services engagement.

an immunity for those serving as expert witnesses, several states, including California, have held that CPAs performing litigation support services are not immune from suite, even from a client.

In June 1994, Mattco Forge, Inc., a small California forging house, rocked the accounting profession when it obtained a jury verdict of more than $42 million against the Big Six accounting firm Ernst & Young. Since the Mattco Forge verdict, the accounting profession has been reassessing its exposure to liability in providing litigation services. Following are some practical steps that CPA firms can take to minimize the risk of liability.

1. **Recognize that litigation services is a highly specialized area with unique staffing requirements.** In former

years, some CPA firms mistakenly believed that any CPA was qualified to testify in court as an expert witness. However, it is no longer enough to be a CPA. In recent years, the litigation services marketplace has been completely transformed. Specialty forensic accounting firms, both large and small, have emerged as industry leaders in many cities. The Big Six and others have organized separate litigation service practice groups that effectively compete with the specialty firms.

Litigation services is a practice area in which CPAs offer professional assistance to lawyers. In litigation services, CPAs are called upon to apply accounting principles or concepts to a specific business issue raised by the litigation and vigorously disputed by the

litigants. In the course of formulating their opinions, litigation services practitioners are often required to make reasonable assumptions about events that never occurred and to prepare analyses that are based upon those assumptions. In addition, litigation services practitioners are often faced with difficult choices among various analytical approaches. In choosing the proper analytical framework, experts seek a mode of analysis that is supported by applicable accounting theories and is consistent with the client's litigation positions. To provide this assistance, CPAs not only must be familiar with accounting principles and theory, but also must have a working knowledge of the litigation process and the rules that govern it.

It is essential that a firm's litigation services department be staffed by individuals with appropriate training in the litigation process. The litigation process is filled with traps for the unwary. The stakes are high and the margin of error is narrow. CPAs who do not have an understanding of the litigation process and only occasionally provide litigation services are most likely targets for a litigation services malpractice case.

To be effective, litigation services practitioners must have a temperament and personality compatible with the demands of the litigation process. They often work under tight deadlines, and their work is subject to meticulous scrutiny. furthermore, serving as an expert witness can be an extremely stressful experience.

Many people simply don't have the constitution for it.

Since the ultimate objective of many litigation services engagements is testimony before a trier of fact, particularly a jury, the practitioner must be a "people person." He or she must have the ability to relate to the juror s on a personal level while earning their trust and respect. The CPA engaged in litigation services must be confident, mature, and forward-looking. The expert not only must anticipate the adversary's criticism, but also must be able to respond calmly and persuasively to that criticism without exhibiting anger or hostility toward a lawyer attempting to frustrate and confuse the witness.

before committing the time and resources necessary for appropriate

training of litigation services staff, the CPA firm should realistically assess whether a particular professional possesses the personality traits needed to provide effective service and develop into a credible expert witness.

Experts must have outstanding communications skills. Expert witnesses can be effective only if they can simplify complex ideas so that a jury can follow the logic of their analytical framework. They must also deliver testimony in a professional manner without showing bias. the jury will not react well to an expert witness who doesn't seem to be good at his or her job.

The CPA firm will be rudely surprised if a lawsuit is brought against it based on work done by a litigation services practitioner who is not a credible

witness. The plaintiff in a litigation services malpractice case is likely to hire an expert who is an excellent communicator and teacher. The plaintiff's dream is to be able to contrast his or her expert with a defendant's expert who is lackluster. Cases are often won and lost based on the jury's reaction to expert testimony. Trial is theater. An effective expert witness has courtroom presence. His or her analysis not only must be substantively correct, but also must be presented well. An analysis that is technically correct but poorly presented seldom carries the day.

2. **Implement training programs that ensure litigation services practitioners have a working knowledge of the rules of evidence and the rules of procedure.** The goal of an expert witness engagement is an

effective trial presentation by the expert witness. CPAs engaged in litigation services must be aware of the rules that can both enhance and detract from the effectiveness of the trial presentation. Most CPAs inexperienced in litigation services do not know the rules of procedure and evidence because they are not covered in detail in the typical business law courses that accounting majors take in college.

However, even though most CPAs do not have a law degree, seasoned practitioners with an understanding of the litigation process can appreciate the significant impact of the rules of procedure and the rules of evidence on their work.

In experience staff should be schooled in the litigation process before they begin actively practicing in the

litigation services area. At a minimum, CPA firms should develop in-house programs or use external training resources to instruct practitioners in the important interplay between the rigid evidentiary rules that govern lawsuits and the assumptions and data that necessarily serve as the building blocks of the expert's opinions.

Witness preparation and testimony techniques can be part of the firm's training program. Expert testimony in court is not for everyone. During cross-examination, an expert is confronted and challenged. The expert must learn how to respond to cross-examination without offending the jury. The is not book learning. Witness skills are best taught in participatory seminars in which the expert witness is cross-examined by

experienced trial lawyers.

Develop an engagement acceptance process that eliminates potential problems and implements a plan for avoiding common pitfalls. As a preliminary step in minimizing the risk of a litigation services malpractice claim, the CPA firm should carefully screen proposed engagements to prevent complications rising from such problems as conflict of interest, prior inconsistent testimony and writings, inadequate access to data, and difficult working relationships.

While there is considerable debate over the extent to which conflict of interest principles apply to CPA firms performing litigation services, the profession should anticipate that the courts will impose strict conflict of interest rules upon CPAs serving as

consultants and expert witnesses. CPA firms should develop appropriate conflict of interest policies and make sure that those policies are rigidly observed. Firms can consult AICPA Consulting Services Special Report 93-2, Conflicts of Interest in Litigation Services Engagements, for examples of situations that give rise to conflict of interest.

There can be nothing more embarrassing to a witness--and potentially more devastating to the client--than being confronted with writings or testimony that conflicts with the opinion being given on the stand. As part of the engagement acceptance criteria, litigation services practitioners should ensure that they will not be embarrassed by prior writing or testimony that is inconsistent. This is especially true in light of the recent

amendments to Federal Rule of Civil Procedure 26(a)(2), which require that experts provide, as part of a written report, a list of all testimony in trial or deposition that they have given in the previous four years and of all the publications they have written in the previous ten years.

The litigation services practitioner needs to obtain sufficient data to perform his or her expert analysis. Nonetheless, litigators sometimes expect the expert to come up with an ironclad opinion, even though only a limited amount of data is available. In some cases, by the time an expert is hired, the opportunity for effective discovery may have passed, thereby compromising the expert's ability to conduct an appropriate study. If that is the case, the firm should seriously

consider declining the engagement. It may well be more trouble than it will be worth.

4. Ensure that litigation services practitioners communicate fully, freely, and frankly with the trial lawyer. The practitioner should try to ensure that the trial lawyer will be receptive to his or her needs. In the initial meeting, the litigation services practitioner must carefully evaluate whether he or she can work effectively with the trial lawyer.

Effective communication with the trial lawyer is perhaps the most important ingredient in preparing a successful expert witness presentation. Because written communications between litigation services practitioners and attorneys may become discoverable, most communications between attorneys and experts are oral.

While most other service providers can protect themselves from liability by "paper the file," that option is not available to the litigation services practitioner. Thus, the litigation services practitioner must make sure that he or she will be working with an attorney who will be available for ongoing consultation.

It is perfectly appropriate to extract promises from the trial lawyers as a condition of accepting the engagement. For example, the litigation services practitioner in charge of an engagement could insist that he or she maintain a direct line of communication with the lead trial lawyer. Relying upon junior members of the trial team to serve as go-between only increases the risk of misunderstanding. Presumably, the lead

trial lawyer will be presenting the expert for testimony at trial. The lead trial lawyer is more likely to sharply focus upon strategic concerns relevant to the expert's work. If the lead trial lawyer won't agree to be the primary contact for the engagement, the CPA will probably have communication difficulties later.

The litigation services practitioner must establish the communication ground rules early in the litigation. As part of the adversarial process, the identities of the experts are disclosed during the discovery process. Once an expert has been identified, withdrawing from the engagement can be a sticky problem. For this reason, litigation services practitioners must be very careful in accepting engagements.

The expert must stay on top of the

case. As the litigation process proceeds, the claims of the parties often change. by the time of trial, the scope of an expert witness engagement can also change dramatically. The expert witness should periodically call the attorneys to monitor the progress of the case. In particular, the expert should be aware of deadlines to avoid timing problems associated with gathering data or preparing an expert report. It is essential that the expert work with the trial lawyer to build an appropriate evidentiary foundation for an effective expert witness presentation.

5. **Carefully monitor the firm's promotional materials.** As the market for litigation services has become increasingly competition, CPAs are aggressively marketing their services with promotional brochures that highlight their

firms' capabilities. While effective as a tool for obtaining business, marketing brochures may turn into a deadly piece of evidence in a malpractice trial.

Statements about the qualifications of those working on an engagement or the firm's experience and capabilities can be troublesome. If those representations are found to be false or exaggerated, the firm can be held liable on a variety of misrepresentation theories. If the firm overstates its credentials and capabilities and cannot live up to the picture painted in its promotional materials, the jury will be all the more willing to impose liability upon it.

CONCLUSION

The litigation services practice presents a wealth of opportunities for CPA firms. Because the practice has become

increasingly competitive and sophisticated in recent years, CPA firms must recognize that litigation services has emerged as a specialty practice area and make sure that only those who have the requisite training and experience in the litigation process participate in the practice. By organizing a separate practice group and implementing training programs that focus on the litigation process and the CPA's role, CPA firms can participate in a highly competitive market while, at the same time, minimizing the risk of expert witness liability.